United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 27, 2010

TO : Rosemary Pye, Regional Director

Region 1

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Linc Facilities Services 530-4825-6700

Case 1-CA-45538

This case was submitted for advice on: (1) whether the Employer violated Section 8(a)(3) under a Love's Barbeque¹ theory, where the Employer did not hire the predecessor's unit employees; and (2) whether a bargaining obligation attached under Section 8(a)(5) where the Employer negotiated with the Union before the takeover.

We conclude that the Employer did not discriminatorily refuse to hire the predecessor's employees; rather, the Employer would have considered them but they failed to apply. We further conclude that the Employer's discussions with the Union before the takeover did not trigger a bargaining obligation.

FACTS

In April 2009, the Commonwealth of Massachusetts issued a request for contract proposals to maintain the mechanical and monitoring systems for several government-owned buildings in downtown Boston. Those buildings had been serviced by Building Technology Engineers (BTE), which employed about 19 employees, including four HVAC mechanics/technicians. Since 1990, the Pipefitters Association Local 537 (Union) had represented the four HVAC employees (working for BTE and/or its predecessors). The remaining employees were nonunionized monitors.

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¹ Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981).

Events Prior to Employer's Takeover of Building

On June 18, 2009, the Union learned that the Employer, Linc Facilities Services, would be taking over the contract. Union business manager Daniel Watts immediately called Employer Vice President John Lucero and threatened to file a bid protest unless Lucero called back the next day. Lucero did not return the call, and the Union filed a bid protest on June 19 alleging that the Employer lacked a required apprentice program.

On June 22, the Union refused the Employer's requests to withdraw the bid protest. The Employer advised the Union that it intended to interview all unit employees and would recognize the Union if it hired a majority of them.

On June 23, 2009, the State formally awarded the contract to the Employer.

Lucero called Union organizer Bill Young the next day and introduced himself. Lucero told Young that reaching a contract would not be "easy," but that he wanted to deal with Young rather than Watts because Watts was pulling "Jimmy Hoffa tactics."

On June 25, the Employer faxed the Union a side letter for the Union to sign. The side letter provided that: Linc would hire the unit employees, "provided they apply for said positions with Linc and are acceptable under Linc's hiring criteria"; assuming Linc hired them, it would pay the individuals the same as they were paid by BTE; to the extent that they were not eligible for Union benefits, they would be eligible to participate in the Employer's benefits plan under the same terms as nonunion Linc employees; in the event that the Employer hired a majority of the unit employees, the Employer would recognize and bargain with the Union but would not be bound by the terms of the predecessor's agreement.

The Union called the Employer later that day and stated that they could not sign the side letter because it was "too complex" and the Union did not want the employees to have to be interviewed. The Employer told the Union that Linc did not hire employees without interviews.

On June 26, per the Employer's request, the Union faxed the Employer its agreement with BTE. Later that day, the parties discussed whether Lucero would be willing to negotiate with Watts; the Union's insistence that employees be hired without interviews; and the Union's suggestion that the Employer had already recognized the Union by negotiating with its representative.

Also on June 26, Lucero met with two unit employees at the site. Lucero explained that the Employer was taking over the contract. Lucero also gave them applications, with extra copies for the other two unit members. He asked for shirt sizes so their uniforms would be ready, and told them that the next week, they should bring their applications and work authorization materials and that they should be prepared to take a drug test. Lucero conditioned their possible hiring on "things working out" with the Union

The steward gave the applications to the other two unit employees and told them to bring their paperwork with them on Monday to prepare to be hired by the Employer.

That same day, Lucero called Young and asked him about the area wide agreement that Young had dropped off. Lucero brought up drug testing, at which point Young told him that he needed to negotiate with Watts.

Events During Takeover, From June 29 Interview Process through July 1 Takeover

On June 29, Lucero sent a letter to Watts, which reiterated the Employer's intention to interview the unit employees and hire those employees who met the Employer's hiring criteria. The letter stated that the Employer was willing to recognize the Union if it hired a majority of the unit employees. The letter noted that the Union had refused to sign the side letter and that the Union had asked the Employer to execute the Local 537 agreement and hire the unit employees "sight unseen."

Lucero and Watts then spoke by phone. Watts also asked Lucero to sign the area wide agreement and hire all of the unit employees. Lucero faxed a second letter, the same day, confirming this telephone conversation. The letter noted that certain provisions of the Union's area-

wide agreement were in conflict the Employer's contract with the State and otherwise did not apply. Lucero listed various disagreements he had with the area wide agreement, including drug testing. The letter stated that he hoped to reach agreement with the Union.

The Employer's transition team conducted on-site interviews on June 29. The Employer claims that representatives met with applicants on a first-come, first-serve basis in the office, that they did not call any employees into the office, that the monitors showed up without invitation to submit applications, and that the unit employees failed to apply for work that day. Unit employees claim that they were never invited to meet with Linc representatives.

The next day, June 30, Young and Watts went to see the unit employees on their last day as BTE employees. The employees told the Union representatives that Lucero had told them that Linc had wanted to hire them but that the Union had refused to allow it. Watts immediately called Lucero. He went down Lucero's itemized June 29 fax and told him that none of the items were problems. He explained that unit employees would take and pass drug tests and that the parties could agree on other specific contractual issues.

On June 30, as employees were turning in their keys and badges, Lucero told them that he was "sorry things didn't work out." Lucero blamed Watts, and said that Watts thought he was Jimmy Hoffa. Lucero also told one employee that, after the Employer's July 1 takeover, he hoped "we can get something worked out and get you guys back."

Later that same day, at the Union's request, the Employer and the Union, along with their attorneys, met. The Employer again asked the Union to sign the side letter. The Union representatives refused. The Union officials thought that the Employer had already recognized the Union by virtue of their discussions and did not want to sign an agreement that provided that the Employer would only recognize the Union if it hired a majority of the unit employees.

Later that same night, Lucero again told employees that he was sorry things had not worked out and that, if

the Union had signed a side letter, he might have hired them.

Events After Employer's Takeover of Building

The Employer began work on July 1 with most of the predecessor's nonunion employees but none of the unit HVAC employees.

Also on July 1, Lucero and the unit employee steward spoke on the phone several times. The steward told Lucero that the employees were willing to take drug tests and submit applications and that the Union was now willing to sign the side letter. Lucero asked if he was speaking for the Union; the steward said that he was not, but that Lucero could call Watts for confirmation. Lucero called Watts; Watts told Lucero to talk to the Union's attorney and hung up on him.

Lucero called the steward back and complained that Watts had hung up on him. The steward agreed with Lucero that he and other employees would come in at 11 a.m. that day to submit applications and to take drug tests.

The steward immediately called Watts back to report that the steward had offered to have employees submit applications and take drug tests that day. Watts told the steward that the employees should not do so because he believed that a scheduled, State-sponsored mediation on July 7 would make the situation less complicated.

When the employees did not arrive at 11 a.m., Lucero called the steward, asking him where he and the other employees were. The steward told Lucero that Watts would not allow them to apply. No unit members applied for jobs that day.

On July 2, Lucero wrote Watts a letter, criticizing him for his conduct in insisting that the Employer sign the area wide agreement, and for refusing to sign the side letter.

From early-July through early August, the parties' attorneys tried unsuccessfully to resolve the dispute. On August 5, the Union informed the Employer that, since the Employer had initially failed to accept the unit employees'

applications, they were "reapplying." The unit employees then submitted applications, but the Employer informed them that it had no present vacancies.

The State subsequently terminated Linc's contract, pursuant to the Union's bid protest, based on the Employer's lack of an apprentice program.

ACTION

We conclude that the Region should dismiss the Section 8(a)(3) charge, absent withdrawal, because the Employer did not discriminatorily refuse to hire the predecessor's employees, and should dismiss the Section 8(a)(5) charge, absent withdrawal, because the Employer's discussions with the Union prior to takeover did not create a bargaining obligation prior to its hiring a substantial and representative complement of employees and commencing operations as a successor.

Under <u>Burns</u>, an employer that purchases a business from a predecessor and maintains substantial continuity in the enterprise is obligated to bargain with a union that represented the predecessor's employees if (1) the employer hires a substantial and representative complement of employees, a majority of whom had been represented by the union and (2) the union makes an effective demand for recognition. 2

A successor unlawfully discriminates where it refuses to hire enough of the predecessor's employees to constitute a majority of the work force in order to avoid its bargaining obligation.³ To establish a discriminatory refusal to hire, the General Counsel must show that the employer excluded applicants from the hiring process and that antiunion animus contributed to the decision not to

² NLRB v. Burns Int'l Security Services, 406 U.S. 543
(1964).

³ Love's Barbeque, 245 NLRB at 82; Potter's Drug
Enterprises, Inc., 233 NLRB 15, 20 (1977), enfd. 584 F.2d
980 (9th Cir. 1978) (table); Brown & Root, Inc., 334 NLRB
628, 632 (2001).

consider them for employment.⁴ In Love's Barbeque,⁵ for instance, the Board held that a successor employer violated Section 8(a)(3), and became a <u>Burns</u> successor, where it expressed an intention not to have the union at its restaurant; conducted initial job interviews under conditions that "virtually ensured" that the predecessor employees would not know of the interviews; gave inconsistent reasons for not hiring the former employees; and gave false testimony regarding its hiring practices.

Here, the General Counsel cannot establish that the Employer excluded applicants from the hiring process by discouraging them from applying. Thus, despite the fact that the Employer handed out job applications and told employees to submit them, the employees did not submit job applications until more than one month after the takeover. The Union claims that the Employer did not call in employees to be interviewed on June 29 and convinced them that applying would be futile. We recognize that the facts surrounding the June 29 interviews are unclear as to whether the Employer discouraged employees from applying or whether the employees failed to apply. 6 Regardless of what happened on June 29, however, Lucero and the steward clearly agreed on July 1 that the employees would immediately turn in applications and submit to drug testing. But significantly, Watts would not allow employees to apply that day. Given the Union's refusal to

⁴ Wright Line, 251 NLRB 1083 (1980); Rainbow Shops, 303 NLRB 78, 78 fn. 2 (1991) (employer violated Section 8(a)(3) by discouraging some of the predecessor's unionized employees from applying and by unlawfully refusing to hire or consider for hire others).

⁵ 245 NLRB at 81-82.

⁶ We note that both parties' explanations of events on this date do not seem logical: on the one hand, the unit employees did not approach the Linc representatives, despite Lucero previously telling employees that they should submit applications to Linc representatives who would be there to interview that day; on the other hand, the Linc representatives did not take the simple step of calling unit employees into the office to request their job applications and discuss employment.

permit employees to submit to application procedures on July 1, the date of the takeover, the General Counsel cannot meet its burden of establishing that the Employer discriminatorily refused to hire the predecessor's employees or that the Employer convinced employees that applying would be futile.

Moreover, the Employer repeatedly stated that it would recognize and bargain with the Union if it hired a majority of the predecessor's unit employees. The Employer's proposed side letter memorialized the Employer's intention to hire the predecessor's employees, subject to their willingness to undergo the Employer's application procedures, and stated the Employer's intention to recognize and bargain with the Union if it hired a majority of the unit employees. Given the Union's refusal to sign the side letter, we interpret the Employer's alleged statements that it could only hire the unit employees if "things worked out" with the Union to mean that the Employer could only hire the unit employees if the Union agreed to allow employees to submit to the Employer's hiring procedures. In this context, Lucero's alleged references to Watt's "Jimmy Hoffa" tactics are insufficient to establish an anti-union motivation.

The Union also contends that the Employer recognized the Union before the July 1 takeover by engaging in contract negotiations with the Union, such that its refusal to hire the employees without interviews or preconditions violated Section 8(a)(5). This allegation lacks merit.

A <u>Burns</u> successorship obligation attaches only where the employer hires a substantial and representative complement of employees, a majority of whom had been represented by the union. The Employer hired a substantial and representative complement of employees by July 2, none of whom were employed by the predecessor, and, as discussed above, it did not discriminate in failing to hire the predecessor employees. Therefore, a successorship obligation never arose. The Union's suggestion that a successorship obligation arises where an employer, before takeover, discusses hiring procedures and initial terms and conditions of employment with a union conflicts with established Board law on successorship under Burns.

Accordingly, the Region should, absent withdrawal, dismiss the charge.

B.J.K.